STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2014
v	No. 315197 Wayne Circuit Court
JACOB WELCOME WELLS, Defendant-Appellant.	LC No. 12-001384-FC

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of felony murder, MCL 750.316(1)(b); first-degree premeditated murder, MCL 750.316(1)(a); two counts of armed robbery, MCL 750.529; assault with intent to rob while armed, MCL 750.89; three counts of assault with intent to commit murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. The trial court sentenced him to life imprisonment for both the felony murder and first-degree murder convictions; 60 to 90 years' imprisonment for the convictions of armed robbery, assault with intent to rob while armed, and assault with intent to commit murder; 10 to 60 years' imprisonment for the felon-in-possession conviction; and five years' imprisonment for the felony-firearm conviction. We affirm but remand for the ministerial task of correcting defendant's judgment of sentence to reflect one conviction of first-degree murder supported by alternative theories.

Defendant first contends that the trial court abused its discretion in admitting the testimony of a video forensic technician, Sergeant Ron Gibson, stating that the man seen in two different videos had a consistent appearance. We disagree.

"The decision whether to admit evidence is within the trial court's discretion; this Court only reverses such decisions where there is an abuse of discretion." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Defendant has waived the issue of the admission of the testimony in question. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 762 n 7;

597 NW2d 130 (1999) (internal citation and quotation marks omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's actions will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

Defense counsel explicitly stated that he agreed that it would be proper to allow Gibson to testify that the appearances of the person seen in the bar security video and the person seen in the party store video were consistent, thus waiving the present issue. Moreover, even if the trial court's ruling was erroneous, "a party may not harbor error at trial and then use that error as an appellate parachute . . . ." *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).[1]

Defendant additionally makes an argument concerning the testimony of his probation officer and of a bouncer, who identified defendant from videos. However, defendant focuses his argument on the testimony of Gibson and does not make an adequately supported argument concerning the other two witnesses, stating only that their testimony was "false, or, at best, misleading." This argument provides no basis for reversal, because it was up to the jury to assess the credibility of the witnesses, *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005), and defendant's argument about the particular persuasiveness of a police officer's testimony does not apply to these non-police witnesses.[2]

Defendant next contends that defense counsel was ineffective for failing to stipulate to his prior felony conviction. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

Effective assistance of counsel is presumed, and the challenging defendant bears the heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). In order to establish ineffectiveness of counsel, a defendant generally must show that: (1) counsel's performance did not meet an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different; and (3) the result that did occur was fundamentally unfair or unreliable. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). This Court will not substitute its judgment for that of trial counsel concerning matters of strategy, nor will it employ the benefit of hindsight to assess the competence of counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Defense counsel has wide discretion regarding matters of trial strategy. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012).

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[1] At any rate, we note that the testimony was proper. See, generally, *People v Fomby*, 300 Mich App 46; 831 NW2d 887 (2013).

[2] In addition, defendant failed to object to the relevant portion of the probation officer's testimony.

To prove defendant's guilt of being a felon in possession of a firearm, the prosecution was required to prove that defendant was a convicted felon who was ineligible to possess a firearm. MCL 750.224f. If a defendant offers to stipulate to the fact that he was previously convicted of a felony and is ineligible to possess a firearm, the trial court must accept the stipulation to avoid potentially unfair prejudice arising from the introduction of the defendant's prior felony conviction. *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997). However, if the defendant does not offer to stipulate, the prosecutor may introduce evidence of the prior felony. *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999).

Defendant cites *Swint* for the proposition that failure to stipulate to a prior conviction amounts to ineffective assistance of counsel. However, in *Swint*, the issue was the trial court's refusal to accept a stipulation to the defendant's prior felony conviction, not defense counsel's failure to request a stipulation. *Swint*, 225 Mich App at 377. Here, the prosecution elicited testimony from defendant's probation officer that defendant had a prior conviction for attempted first-degree home invasion. Defense counsel could have concluded that it was better for the jury to know the exact nature of defendant's prior felony, rather than to allow the jurors' imaginations to concoct a worse offense. For example, defense counsel could have intended to show the jury that although defendant may have previously attempted to break into a home, he was not a killer. Again, this Court will not substitute its judgment for that of trial counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of counsel. *Payne*, 285 Mich App at 190. Defendant has not shown that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Lockett*, 295 Mich App at 187.

Further, even if defense counsel's actions did fall below an objective standard of reasonableness, defendant cannot show that the result of the proceedings would have been different without the error or that the result that did occur was fundamentally unfair or unreliable. *Id*. The probation officer's testimony regarding defendant's prior conviction was one statement in the middle of over five days of trial. Given the substantial evidence provided by the prosecution, there is no reasonable probability that the proceedings would have turned out differently had defense counsel stipulated to the prior felony.

Defendant next contends that the trial court abused its discretion in admitting a recording of a telephone call between defendant and an associate, Ryan Jones, in which defendant stated that he might be willing to accept a plea if the prosecution offered a 25-year sentence. In order to preserve an evidentiary issue, a party must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). In his brief on appeal, defendant claims to have objected to the playing of the audio recording of the conversation between Jones and defendant. However, he fails to provide a citation for this assertion,[3] and the transcript reveals that defense counsel stated "[n]o objections" when the recording was introduced.

[3] We note that an appellant may not leave it to this Court to unravel the basis for his claims. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

We review unpreserved issues under the plain-error doctrine. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). "Under the plain error rule, [a] defendant[] must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). The third element generally requires a showing of prejudice—that the error affected the outcome of the proceedings. *Id*. Finally, "reversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *Pipes*, 475 Mich at 274.

All relevant evidence is admissible except as otherwise provided by either the state or federal constitutions or by court rule. MRE 402. Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403.

MRE 410 provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
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> (1) A plea of guilty which was later withdrawn;
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> (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
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> (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

MRE 410 is applicable when (1) the defendant exhibited an actual subjective expectation to negotiate a plea deal at the time of the discussion at issue, and (2) the defendant's expectation was reasonable given the totality of the circumstances. *People v Dunn*, 446 Mich 409, 415; 521 NW2d 255 (1994).

Jones testified that defendant told him that his case "doesn't look good." On the audio recording, defendant stated that he was interested in taking a plea deal if he was offered 25 years' imprisonment.

MRE 410(1) and (2) are inapplicable to this case. There is no evidence in the record to suggest, and defendant never claims, that defendant made either a guilty plea or a plea of *nolo*

contendere in this case. MRE 410(3) is also inapplicable because the statement to which defendant objects was not made "in the course of any proceedings under MCR 6.302," which involves the procedures surrounding guilty pleas and *nolo contendere* pleas. In addition, MRE 410(4) only applies to statements made "in the course of plea discussions with an attorney for the prosecuting authority . . . ." Here, defendant was merely speaking to Jones, a friend, about his case. We find that the admission of defendant's statement did not amount to plain error; MRE 410 did not bar its admission and, given the context (in which defendant was discussing his case with a friend and admitting that the case "doesn't look good"), it did have relevance. *Pipes*, 475 Mich at 279 (discussing plain error).

Defendant next contends that the trial court erred in admitting the bouncer's testimony that unnamed individuals asked him why he was going to testify against defendant and told him not to do so. We disagree.

"A defendant's threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt." *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). For such evidence to be admissible, a connection between the threat and the defendant must be shown. *People v Lytal*, 119 Mich App 562, 576-577; 326 NW2d 559 (1982). "[I]t is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case." *Sholl*, 453 Mich at 740.

In *Lytal*, 119 Mich App at 576, the defendant's friend testified that, while the friend was in jail, he had been approached by a few people who threatened him and told him that "Dave," the defendant, wanted to see him. This Court found that the mention of the defendant during the threats was sufficient to establish a connection between the defendant and the threats, and therefore, the evidence was admissible. *Id*. at 577.

We cannot find an abuse of discretion here, especially given that the prosecution had also offered evidence indicating that defendant had stated to Jones that defendant's associates had intimidated another individual who had "snitch[ed] on him." Moreover, we note that the bouncer did not testify about "threats" but merely stated that people had asked him not to testify against defendant. The testimony was not as damaging as testimony about "threats." Under all the circumstances, we simply cannot conclude that the trial court abused its discretion in admitting the evidence.

Defendant lastly contends that the trial court erred in admitting autopsy photographs of Benson because the gruesome nature of the images was overly prejudicial. Again, we disagree.

"Admission of gruesome photographs solely to arouse the sympathies or prejudices of the jury may be error requiring reversal. However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime." *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998) (internal citation omitted). "Photographs may . . . be used to corroborate a witness' testimony, and [g]ruesomeness alone need not cause exclusion." *Unger*, 278 Mich App at 257 (internal citation and quotation marks omitted). Photographs can also be used to show evidence of intent. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995).

All elements of a criminal offense are in issue when a defendant enters a plea of not guilty, and the prosecution must carry its burden of proving each element beyond a reasonable doubt, regardless of whether the defendant disputes any of the elements. *People v McGhee*, 268 Mich App 600, 610; 709 NW2d 595 (2005). "A conviction of first-degree premeditated murder requires evidence that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011) (internal citation and quotation marks omitted).

The prosecution elicited testimony from Dr. Carl Schmidt, a forensic pathologist employed as the medical examiner for Wayne county. Schmidt testified that he personally examined Benson after her death; that Benson's body showed evidence of stippling, indicating close-range firing; and that the autopsy photographs accurately showed Benson's wounds. The autopsy photographs of Benson were relevant to prove that defendant fired a handgun at close range, indicating his intent to kill Benson, MRE 401; MRE 402; *Jackson*, 292 Mich App at 588, and they further corroborated Schmidt's medical testimony, *Unger*, 278 Mich App at 257.

Additionally, admission of the photographs was not barred by MRE 403. "All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *McGhee*, 268 Mich App at 613-614. The three photographs depicted (1) Benson's entire face with the entry wound and some brain matter extruding from the hole, (2) a slightly closer photograph of Benson's face with a measurement of the diameter of the entry wound, and (3) a close-up photograph of the bullet's entry wound with a measurement of the bullet wound. These photographs accurately displayed the injuries Benson suffered. *Mills*, 450 Mich at 77. As the Michigan Supreme Court previously stated in a case involving "gruesome" photographs: "Although the photographs are graphic, their probative value was not substantially outweighed by their possible prejudice." *Id*.

Finally, although this issue is not raised by the parties, we note that defendant's judgment of sentence must be amended to reflect that he has been convicted of one count of first-degree murder supported by alternative theories. *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006).[4]

Affirmed but remanded for the ministerial task of correcting defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto

[4] Under *People v Ream*, 481 Mich 223, 242; 750 NW2d 536 (2008), a felony conviction serving as the predicate for a felony-murder conviction may remain as long as the underlying felony and felony-murder contain differing elements. In any event, the underlying felony here was larceny, of which defendant was not convicted.